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NO. 96-1578

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

HON. THOMAS R. PHILLIPS, et al.,

Petitioners,

vs.

WASHINGTON LEGAL FOUNDATION, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

# BRIEF OF *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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## INTEREST OF *AMICI CURIAE*

The Texas Interest on Lawyers' Trust Accounts Program, like the 50 other similar programs throughout the country (herein collectively referred to as "Interest on Lawyers' Trust Account Programs," or "IOLTA" programs) operates on the premise that nominal sums of money, or short term deposits, held by attorneys on behalf of their clients, constitute an unused economic resource which may be mobilized to generate income to improve the delivery of legal services to the poor. In short, IOLTA establishes a unique method of financing civil legal aid by harnessing assets that, before adoption of the program, were neither used nor capable of use.

The eighty-four (84) *amici curiae,* who are set out in the Addendum to this Brief, and who file this Brief with the consent of the parties, are all organizations vitally interested in the continued growth and success of IOLTA programs as a mechanism for bringing the concept of equal justice under the law a step closer to reality. The forty (40) participating state bar associations have all been instrumental in creating IOLTA programs in their respective states. The forty (40) participating IOLTA administering agencies all collect IOLTA generated funds and distribute them to providers of legal services to the poor, and for other worthy law-related public purposes. The other *amici curiae* are all organizations vitally interested in furthering the principle of equal justice under law for all.

The Fifth Circuit's decision casts a dark cloud on the continued vitality of a program which has justifiably deserved the plaudits it has received from the bench, the bar, the media, and the public. As evident from the multiple challenges to IOLTA programs filed by Respondent, the Washington Legal Foundation, those who oppose legal services to the poor will continue to file suits, with the continuing risk of varying adjudications, until the issue is finally resolved by this Court.

Each participating *amici curiae* believes that IOLTA is critically important to ensuring that those in need of legal services do not go without. Their participation, as well as the separate *amicus curiae* brief of the American Bar Association, all attest to the nationwide acceptance of the IOLTA concept by a broadly representative sample of the legal profession. Firmly believing that IOLTA programs are in the best tradition of the legal profession and not violative of the Fifth Amendment, *amici curiae* fully support the Justices of the Texas Supreme Court and the Texas Equal Access to Justice Foundation.



## REASONS FOR GRANTING THE WRIT

***THE FIFTH CIRCUIT'S DECISION STRIKES DOWN A PROGRAM WHICH HAS BEEN ACCEPTED IN ALL 50 STATES — A PROGRAM WHICH THE RESPONDENTS ADMIT DOES NOT INJURE THEM, EVEN TO THE EXTENT OF A PENNY — CONTRARY TO THE DECISIONS OF TWO OTHER CIRCUITS AND SEVEN STATE SUPREME COURTS***

### A. The IOLTA Premise

IOLTA establishes a unique method of financing civil legal aid to the poor by harnessing assets that, before adoption of the program, were neither used nor capable of being used to produce income. With IOLTA, all the nominal or short term funds held by an attorney, funds which by themselves are incapable of producing income net of expenses, are pooled in a single NOW account, and the resulting net income is used to fund public service activities, with the overwhelming majority of the funding used for legal aid activities.

In rejecting Texas' IOLTA program, the Fifth Circuit, unlike the First and Eleventh Circuits, and the 45 state supreme courts which have approved similar programs, refused to recognize that IOLTA combines lawyer trust account mandates, banking law restrictions, and economic realities, to produce net income where, previously, there was no net income.

IOLTA programs originated in Australia, initially as a way to finance client security funds, and then spread to Canada, where some of the IOLTA generated funds were used for legal aid. England & Carlisle, *History of Interest on Trust Accounts Program*, 56 Fla. B.J. 101 (1982). In the

United States, Florida was the first state to authorize an IOLTA program, *In re Interest on Trust Accounts*, 356 So.2d 799 (Fla. 1978), with implementation commencing in 1981. *Matter of Interest on Trust Accounts*, 402 So.2d 389 (Fla. 1981).

IOLTA is simplicity itself. Attorneys routinely receive funds in trust for future transactions. If the funds are large in amount or expected to be held for a long time, the attorneys customarily deposit the funds in an interest-bearing account for the benefit of the client. IOLTA does not change this time-honored practice.

Often, however, lawyers hold clients' money in amounts which are very small or expected to be held for a very short period of time, making it impracticable and uneconomical to invest the money productively for the client. Bank services charges, as well as bank rules limiting the payment of interest on accounts not open as of the end of a month, or for a specific time period, all preclude the possibility of earning interest on many client trust account deposits. Likewise, the wide range of costs that lawyers incur, including (1) the time to determine whether investment is warranted, (2) the time to obtain tax identification information, (3) the time to open a separate, income producing account, (4) law firm bookkeeping on a periodic basis, (5) preparation of tax reporting forms, and (6) the time required to close a separate, income producing account, preclude the earning of net income on many client trust accounts. See A.B.A. Task Force and Advisory Board on Interest on Lawyer Trust Accounts, *Report to the Board of Governors*, 22-24 (July 1982). Now, as a result of the creation of the IOLTA programs, all the inherently unproductive client deposits are pooled in interest-bearing NOW accounts. The interest earned only because of the IOLTA pooling is used to support law-related public services. As Respondents Mazzone



and Summers acknowledged before the district court, clients lose nothing because of IOLTA.

A few brief examples of the nonproductive funds one would expect to find in an attorney's trust account will demonstrate why no client is injured, not even to the extent of a penny.

1. **Cost Deposits**. A client involved in litigation is often required to provide costs in advance. In entrusting funds to the lawyer for the payment of costs, the client has no expectation of having the funds returned (although excess advances will be returned) nor any expectation of earning interest. The facts in *Cone v. State Bar*, 819 F.2d 1002 (11th Cir.), *cert. denied*, 487 U.S. 917 (1987), are typical. The client gave her attorneys a $100 cost deposit. At the time of receipt, the small size of the deposit, as well as the expectation that the funds would be promptly disbursed, did not justify an effort to invest the funds. After disbursement, the small amount left over, $13.75, also did not justify investment. Indeed, as a practical matter, $13.75 is inherently incapable of being put to productive use for an individual. The approximately 4¢ per month in earnings on $13.75, at current NOW account rates, would not offset bank service charges, let alone the costs incurred by attorneys to administer a separate interest-bearing account.

2. **Real Estate Escrows**. An attorney, representing the seller of a small piece of property, receives $500 to be held in escrow. At closing, some thirty to sixty days later, the deposit is applied to the sales price. If closing does not take place, depending on the sales contract and other factors, either the buyer or seller may be entitled to the deposit. The interest on the deposit, $2.19 per month, at current NOW account rates, would not justify the time and expense required to set up a separate NOW account.

3. **Personal Injury Settlements.** Settlements come from insurance companies in the form of checks or drafts. Banks customarily indicate a time period in which it is safe to assume that the insurance company has accepted the draft or the check has cleared, but in fact the credit to the lawyer's trust account may occur sooner. In addition, there are a number of circumstances under which monies from the check or draft may stay in the account for several days after disbursements are made. For example, assume $50,000 is received by an attorney on a Monday. The lawyer's trust account check is mailed to the client that day. It is received and deposited by the client on Wednesday. It clears the lawyer's bank on Friday. Does the client have any expectation of receiving interest earned by the settlement amount during the "float" period? Clearly not. Moreover, the cost of opening a separate account to process the settlement proceeds would far exceed the $28.76 that might be earned if the funds were placed in a separate, interest earning NOW account. Yet, as a result of IOLTA, that amount is available to support legal services to the poor.

4. **Real Estate Closings.** In many instances, real estate closings are done in law offices. The attorney may receive the funds by wire a day in advance, thereby producing a one day accrual of interest. Or, the closing may be unexpectedly delayed for a day or two to clear last minute problems. As with personal injury settlements, disbursement checks will not clear instantly. The short term float will produce interest that cannot readily be apportioned in any economic way. Before IOLTA, only banks benefited from the float. Now, the public shares in the benefit.

### B. IOLTA's Nationwide Acceptance

This case cries out for the granting of certiorari because the impact of the Fifth Circuit's decision will be felt in every state in the nation. Today, all fifty states and the District of



Columbia have adopted IOLTA programs. Collectively, the programs have raised millions of dollars, primarily to support the provision of legal aid to the poor. With the cuts in federally funded legal services programs, IOLTA has become even more vital; it has become the second largest source of funds for legal aid programs.

Two basic reasons account for the overwhelming acceptance of IOLTA. First, the legal profession fully recognizes the critical need for additional resources to improve the justice system. Second, while the public, and particularly the poor benefit, clients suffer no loss when their nominal or short terms deposits, only because they are pooled in an IOLTA account, produce income net of expenses.

The highest courts of seven states, in adopting IOLTA programs for their respective states, have expressly held that IOLTA does not violate the Fifth Amendment. *Matter of Interest on Trust Accounts*, *supra*, 402 So.2d 389; *Petition of Minnesota State Bar Association*, 332 N.W.2d 151 (Minn. 1982); *Petition of New Hampshire Bar Association*, 122 N.H. 971, 453 A.2d 1258 (1982); *Matter of Interest on Lawyers' Trust Acc.*, 672 P.2d 406 (Utah 1983); *In the Matter of the Adoption of Amendments to CPR DR 9-102 IOLTA*, 102 Wash.2d 1101 (1984); *In the Matter of Interest on Lawyers' Trust Accounts*, 283 Ark. 252, 675 S.W.2d 355 (1984), *rev'g*, 279 Ark. 84, 648 S.W.2d 480 (1983); *Petition by Massachusetts Bar Ass'n*, 395 Mass. 1, 478 N.E.2d 715 (1985).

In addition, like Texas, thirty-seven other state supreme courts and the District of Columbia Court of Appeals have adopted IOLTA programs without formal opinion, although in each jurisdiction the Fifth Amendment was raised as a bar

to adoption of the program.[1] IOLTA programs have been established by legislation in five states, California, Connecticut, Maryland, New York and Ohio. The American Bar Association has endorsed the ethical propriety of IOLTA programs. A.B.A. Formal Opinion 348, 68 ABA J. 1502 (1982).

Prior to the ruling of the Fifth Circuit, no court in an adversary proceeding had ever rejected an IOLTA program. In an identical challenge brought by the Washington Legal Foundation, Massachusetts' IOLTA program was upheld. *Washington Legal Foundation v. Massachusetts Bar Foundation*, 993 F.2d 962 (1st Cir. 1993). The Florida program was upheld in *Cone v. State Bar*, *supra*, 819 F.2d 1002. The California IOLTA program was upheld in *Carroll v. State Bar of California*, 166 Cal. App. 3d 1193, 213 Cal. Rptr. 305 (4th Dist. 1984), *cert. denied sub nom. Chapman v. State Bar of California*, 474 U.S. 848 (1985). In *Ronwin v. Supreme Court of Iowa*, (No. 84-1641), *cert. denied*, 471 U.S. 1101 (1985), this Court refused to review the Iowa Supreme Court's rulemaking adoption of an IOLTA program.

The decision of the Fifth Circuit stands in sharp contrast to the literally hundreds of judges from 45 states, the District of Columbia, and the First and Eleventh Circuits,

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1. The Supreme Courts of Arkansas, Maine, Michigan and North Carolina initially rejected and then approved IOLTA programs. The Supreme Court of Indiana initially refused to adopt an IOLTA program on the grounds that it violates the State's Rules of Professional Conduct. *Matter of Indiana State Bar*, 550 N.E.2d 311 (Ind. 1990). Legislation adopting an IOLTA program was struck down on separation of powers grounds. *Matter of Public Law No. 154-1990*, 561 N.E.2d 791 (Ind. 1990). Thereafter, the Indiana Supreme Court, acting pursuant to its rulemaking power, adopted an IOLTA program.



who have concluded that the Fifth Amendment is not a bar to implementation of an IOLTA program.

### C. The Fifth Circuit's Decision is Fundamentally Flawed

The Fifth Circuit's decision directly conflicts with controlling decisions of this Court setting forth the analytical framework necessary to evaluate a Fifth Amendment claim that property has been taken without just compensation. The fundamental flaw is the Fifth Circuit's failure to recognize that nominal or short term trust account deposits do not produce, and are inherently incapable of producing, any property which would ever benefit the client.

Before IOLTA only banks benefited from the use of inherently unproductive client trust funds. Now, the justice system, the public, and the poor benefit. If IOLTA is abolished, financial institutions will receive a windfall, some of the poor will again be denied access to the justice system, and clients with nominal or short-term deposits will find their position unchanged. Indeed, attorney-Respondent Mazzone admits that the client funds he places in his IOLTA account "cannot practicably be placed into separate interest-bearing accounts, because the additional costs of establishing and maintaining such accounts usually would exceed any interest I could earn for my clients." And client-Respondent Summers admits that his funds were placed in an IOLTA account because his attorney told him that "the cost of establishing and administering a separate account ... most likely would exceed any interest that could be earned on those funds."

In deciding that IOLTA offends the Fifth Amendment, the Fifth Circuit did not meaningfully address the issue of whether the Respondents have any property interest in the income created only because of the IOLTA program. The decision failed to apply the holding of *Board of Regents of*

*State Colleges v. Roth*, 408 U.S. 564 (1972), that in order to recognize a property interest, the claimant must be able to identify a legitimate claim of entitlement. Yet, implicit in the rulemaking of the Texas Supreme Court when it adopted the Texas IOLTA program, is the holding that interest earned on pooled nominal or short-term funds, which by themselves are incapable of producing income net of expenses, and which are held in an attorney's trust account, do not belong to the owner of the principal.

Having assumed the existence of property, despite the lack of Texas law establishing any entitlement in the circumstances herein presented, the Fifth Circuit overlooks, indeed it never cites, the multifactor balancing test of *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), which examines taking claims by looking to the character of the governmental action and the economic impact of that action on the claimant, and particularly, the extent to which the action has interfered with distinct investment-backed expectations. Yet, Penn Central leads to the inevitable conclusion that IOLTA programs do not take the client's property. Or as Justice Peckham put it nearly a century ago, if a claimant is "not injured to the extent of a penny . . . his abstract rights are unimportant." *Hooker v. Burr*, 194 U.S. 415, 419 (1904).

Because established takings doctrine requires at least some loss, and because Respondents admit that they suffered no loss due to the operation of the Texas IOLTA program, their Fifth Amendment claim is not well-founded. If customary trust rules are applied, a client has no claim to interest earned in situations where the interest earned does not exceed the administrative costs incurred. IOLTA operates on that very real set of facts. Absent at least some real loss, no caselaw from this or any other court, turns a regulatory scheme into a taking.



*Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980) is not to the contrary. The fund at issue in *Webb's*, more than $1.8 million, clearly could, and did, produce net income after expenses. *Webb's* certainly does not preclude the IOLTA proponent's calculus that recognizes the real cost of producing net income. Before IOLTA only banks benefited from the use of inherently unproductive client trust funds. Now, the justice system and the public benefits. If the Fifth Circuit's decision stands, only banks, not the public and certainly not clients, will benefit.

## CONCLUSION

This case is of vital importance to Texas, Louisiana and Mississippi. It is also of vital importance to the other 47 states outside the Fifth Circuit and to the District of Columbia. Each of these jurisdictions has adopted an IOLTA program as a means of helping to provide equal justice to all. Because of the national importance of IOLTA, conflict in the circuits, and conflict with the states, *amici curiae* urge that certiorari be granted and that the decision of the Fifth Circuit be reversed.

Respectfully submitted,

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## ADDENDUM

### THE *AMICI CURIAE*

Alabama Law Foundation, Inc.
Alabama State Bar
Arizona Bar Foundation
State Bar of Arizona
Arkansas Bar Association
Arkansas IOLTA Foundation, Inc.
The Legal Services Trust Fund Commission of the State Bar of California
The State Bar of California
Colorado Bar Association
Colorado Lawyers Trust Account Foundation
Connecticut Bar Association
The Connecticut Bar Foundation
The Florida Bar
The Florida Bar Foundation
Georgia Bar Foundation
Hawaii Justice Foundation
Hawaii State Bar Association
Idaho Law Foundation, Inc.
Idaho State Bar
Lawyers Trust Fund of Illinois
Illinois State Bar Association
Indiana State Bar Association
Lawyer Trust Account Commission of the Supreme Court of Iowa
The Iowa State Bar Association
Kansas Bar Foundation
Kentucky IOLTA Fund
Louisiana Bar Foundation
Louisiana State Bar Association
Maine Bar Foundation
Maine State Bar Association



Maryland Legal Services Corporation
Maryland State Bar Association
State Bar of Michigan
Michigan State Bar Foundation
Minnesota State Bar Association
The Mississippi Bar Foundation
The Missouri Bar
Missouri Lawyer Trust Account Foundation
Montana Law Foundation
State Bar of Montana
National Association of IOLTA Programs, Inc.
National Legal Aid and Defender Association
Nebraska Lawyers Trust Account Foundation
Nebraska State Bar Association
Nevada Law Foundation
State Bar of Nevada
New Hampshire Bar Association
New Hampshire Bar Foundation
The IOLTA Fund of the Bar of New Jersey
New Jersey State Bar Association
New Jersey State Bar Foundation
State Bar of New Mexico
New Mexico Bar Foundation
IOLTA Fund of the State of New York
New York State Bar Association
North Carolina Bar Association
North Carolina Association of Black Lawyers
North Carolina State Bar Plan for IOLTA
Ohio Legal Assistance Foundation
Ohio State Bar Association
Oklahoma Bar Association
Oklahoma Bar Foundation, Inc.
Oregon Law Foundation
Oregon State Bar
Pennsylvania Bar Association
Lawyer Trust Account Board (Pennsylvania)
Philadelphia Bar Association

Rhode Island Bar Association
Rhode Island Bar Foundation
South Carolina Bar
South Carolina Bar Foundation
State Bar of South Dakota
Tennessee Bar Foundation
Tennessee Bar Association
Vermont Bar Association
Vermont Bar Foundation
The Virginia Bar Association
Legal Services Corporation of Virginia
Legal Foundation of Washington
Washington State Bar Association
King County Bar Association (Washington)
West Virginia Bar Foundation
West Virginia State Bar
Wisconsin Trust Account Foundation, Inc.